FILE COPY

SUPREME COURT U.S.
DEC 6 1937
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 163.

THOMAS J. BRADY,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT FOR THE RESPONDENT.

THOMAS M. PIERCE,
JOSEPH L. HOWELL,
WALTER N. DAVIS,
Counsel for Respondent.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Statement of the case	1
Assignment of errors	13
Points and authorities	14
Brief of the argument	18
Position of respondent that Wabash car No. 76085 was not in use at the time of the accident within the meaning of 45 U. S. C. A., Sections 11 and 13	18
Position of respondent that a car inspector hunting for defects and defective safety appliances does not come within the purview of 45 U. S. C. A., Sections 11 and 13	23
Position of respondent that the defective grab iron on Wabash car No. 76085 was not the proximate cause of petitioner's injuries	33
Position of respondent that petitioner, a car inspector, assumed the risk of finding defective safety appliances	34
Position of respondent that petitioner's act of inspection, as alter ego of master, intervened to break the causal connection when Wabash Railway Company accepted the car for inspection	35
Position of respondent that petitioner's instruction No. 1 constituted error	36
Position of respondent that trial court erred in permitting petitioner to introduce in evidence rule No. 2	38
Position of respondent that damages awarded by jury are excessive	39

Cases Cited.

Allen v. Terminal Railroad, 68 S. W. (2d) 709 (Mo.).. 16
Brady v. Wabash R. Co., 329 Mo. 1123, 49 S. W. (2d) 24, 83 A. L. R. 655.....2, 14, 15, 21, 29
Brady v. Terminal Railroad, 102 S. W. (2d) 903 (Mo.) 14, 18
Baltimore & Ohio R. Co. v. Hooven, 297 Fed. 919..... 14
C. & O. Ry. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42, 74 L. ed. 207.....16, 31
C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 945, 70 L. ed. 914.....16, 31
C. & O. Ry. Co. v. Stapleton, 279 U. S. 587, 49 S. Ct. 422, 73 L. ed. 861..... 16
Chicago etc. R. Co. v. Coogan, 271 U. S. 472, 46 S. Ct. 564, 70 L. ed. 1041..... 17
Davis v. Wolfe, 263 U. S. 239, 44 S. Ct. 64, 68 L. ed. 284 .....15, 33
Flynn v. Kramer, 271 Mich. 500, 261 N. W. 77.....17, 43
Gilvary v. Cuyahoga V. R. Co., 292 U. S. 57, 54 S. Ct. 573, 78 L. ed. 1123..... 16
Kaminski v. C. M. & St. P. R. Co., 180 Minn. 619, 213 N. W. 189, certiorari denied 282 U. S. 872, 51 S. Ct. 78, 75 L. ed. 770.....14, 21
Kansas City, M. & O. Ry. Co. v. Wood, 262 S. W. 520 (Tex. Civ. App.).....14, 26
Kurtz v. Detroit T. & I. R. Co., 238 Mich. 289, 213 N. W. 169.....14, 19, 21
Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729 .....15, 26, 33
L. & N. R. Co. v. Cook, 150 Ky. 689, 150 S. W. 802...15, 27
McCalmont v. Penn. R. Co., 283 Fed. 736.....14, 20
Martin v. Wabash R. Co., 325 Mo. 1107, 30 S. W. (2d) 735 .....16, 28

Minneapolis etc. R. Co. v. Popplar, 237 U. S. 369, 35 S. Ct. 609, 59 L. ed. 1000 16
Moore v. Railroad, 291 U. S. 205, 54 S. Ct. 402, 78 L. ed. 755 16
N. Y. etc. R. Co. v. Kelly, 70 Fed. (2d) 548, certiorari denied 293 U. S. 595, 55 S. Ct. 110, 79 L. ed. 689 ..... 14, 19
Noftz v. B. & O. R. Co., 13 Fed. (2d) 389 ..... 15, 27
Railroad v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290 ..... 15, 25, 33
Railroad v. McWhirter, 229 U. S. 265, 33 S. Ct. 858, 57 L. ed. 1179 15
Reetz v. C. & E. I. R. Co., 46 Fed. (2d) 50 21
Rittenhouse v. Railroad, 299 Mo. 199, 252 S. W. 945 ..... 15, 26
St. L. S. W. Ry. v. Johns (Tex. Civ. App.), 286 S. W. 281 15
Stein v. Battenfield O. & G. Co., 327 Mo. 804, 39 S. W. (2d) 345 ..... 16, 30, 34
Sherry v. B. & O. R. Co., 30 Fed. (2d) 487 ..... 14, 20
Thomson v. Downey, 78 Fed. (2d) 487 ..... 16, 17, 39
Toledo etc. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 72 L. ed. 513 ..... 15, 28

United States Statutes.

45 United States Code Annotated, Sections 11 and 13 ..... 14, 18

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 163.

THOMAS J. BRADY,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT FOR THE RESPONDENT.

STATEMENT.

This is an action for damages for personal injuries, predicated on a Federal Employers' Liability Act and a Federal Safety Appliance Act, known as the Grab Iron Act. The jury returned a verdict in favor of plaintiff and against defendant in the sum of $15,000.00, and de-

fendant appealed from the judgment entered on the verdict.

Plaintiff is the same as the plaintiff in Brady v. Wabash R. Co., 49 S. W. (2d) 24. Generally speaking, the facts are the same.

The facts adduced on behalf of plaintiff warrant the finding that plaintiff, thirty-one years of age, a car inspector in the employ of the Wabash Railroad Company, earning $175.00 a month, was injured at Granite City, Illinois, on November 20, 1927, about 9:30 or 10:00 o'clock in the evening, when a grab iron on Wabash Railroad Company car No. 76085, which had just been transported in a train of cars from St. Louis, Missouri, to Granite City, Illinois, pulled loose and caused him to fall to a depth of 10 or 12 feet to the ground on his back, during his inspection of said Wabash car, to determine whether the safety appliances on said car and train of cars were in proper condition. Said car and train of cars had been delivered by defendant to said Wabash Railroad Company about three hours before. The purpose of the inspection was to determine whether or not the cars were to be accepted by the Wabash. If the cars were in condition to continue the journey, they would be carded. Between 50 and 60 cars were in said drag or train and he had inspected 35 or 40 cars before the accident.

At the time of his injury, plaintiff was engaged in inspecting said train of cars, on track No. 11, in the Wabash yards, at Granite City, Illinois, which track and yards were owned by the said Wabash Railroad Company. Plaintiff was classed as a car inspector. Plaintiff said that, at the time of his injury, he was going to inspect the roof of this Wabash car, and, when he got to the top, going up the ladder, he flashed his light on the side ladder to see if it

were in good shape and, when he got up to the top, he got hold of the top iron to pull on it and, when he pulled on the top grab iron, it felt firm and solid, but when he started to go up on the top of the car and put his weight on it, the whole ladder pulled off and he fell to the ground. His purpose was to go to the top of the ladder to inspect the roof. He had his lantern in his left hand, and flashed his light on the grab iron to see if the nails were on it. The grab iron sets 12 to 14 inches from the side of the car, running parallel with the side of the car, and is made of wrought iron. It is attached to the wooden latitudinal running board by straps of iron and half inch bolts on either side. The grab iron felt firm when he took hold of it, but the latitudinal running board pulled off at the back end when he put his weight on it. The wood was old and rotten and was rotted around the bolt. No engine was attached to the train of cars while plaintiff was inspecting them; the train had not been broken up, the cars were coupled together and they were just as they came in.

Plaintiff said that it was his duty, as Wabash inspector, to inspect all cars delivered there, no matter what road delivered them, whether it was the Pennsylvania or Terminal Railroad. It was his duty to inspect cars to see if they were in a safe and serviceable condition to continue on. In inspecting the cars on this occasion, he was looking for defects on all running gears and safety appliances and everything. He said that the grab iron that he caught hold of and that pulled out was a safety appliance. The Wabash knew that he inspected all cars that were delivered to it, and defendant knew that he would make that kind of an inspection. The purpose of the inspection was to determine whether the cars were to be received or rejected by the Wabash, to see whether

there was any reason why the car was to be rejected or whether it was O. K., and he was in the act of inspecting it when he fell.

Plaintiff said that the Wabash Railroad Company and defendant were subscribers to the A. R. A. rules. Plaintiff then offered in evidence Rule 2, reading:

> "Rule 2. Yard interchanging cars. Paragraph 3. Cars (whether loaded or empty) having defects in violation of the Safety Appliance Act should not be offered in exchange."

The car that plaintiff was inspecting at the time of his injury belonged to the Wabash Railroad Company, his employer.

It was agreed that Wabash car, No. 76085, was received by defendant from the Wabash Railroad Company, at defendant's Grand Avenue Yards on November 16, 1927, and on the same date was transferred by defendant to its Bremen Avenue Yards, and later on same date was transferred by defendant to its Tenth Street Yards, where it remained until November 17th, and that it was placed on November 17, 1927, in the Tenth Street warehouse, where it remained until November 20, 1927, when defendant pulled it from the warehouse and placed it on track 11, in the Wabash Yards at Granite City, Illinois, about 6 P. M. on November 20, 1927. Plaintiff said that defendant received that car from the Wabash and switched it to some industry and then switched it back and tendered it to the Wabash.

It was agreed that the Wabash Railroad Company and defendant were common carriers engaged generally in interstate commerce. It was further agreed that a string of cars, of which Wabash car 76085 was one, was brought

over on November 20, 1927, by defendant from St. Louis, Missouri, to Granite City, Illinois, all of which cars were coupled together at the time plaintiff was inspecting them for the Wabash Railroad Company and was injured, and that said cars had moved in interstate commerce and contained shipments that were being moved in interstate commerce, and among them were cars destined for foreign cities located in states other than the State of Missouri and the State of Illinois.

Plaintiff's evidence as to his injuries tends to show that plaintiff landed on his back when he fell. That about a half hour after the accident he was taken to the Granite City Hospital, where he remained for two or three weeks, although the hospital records show that he was discharged therefrom on November 26, 1927, six days after the accident. They bandaged his back and treated his left hip, where it was cut, bruised and rubbed by the cinders. Three or four days after he returned home, for possibly a month or two, he was taken back and forth to the office, where he remained for several hours. He was still being treated by the Wabash doctor at Granite City. He suffered pain every day in the middle of his back. His hips were bruised and he had trouble getting up and down, and used a cane. While at the Wabash office he was not required to do any work. He made no improvement at all while under the care of the Wabash doctor, he got worse all the time. He then went to see Dr. Meinhardt, who treated his back electrically and massaged it. At the time of the accident, he weighed 155 pounds. At one time thereafter he weighed 115 pounds. In 1929, he went to Western Texas and remained a year and a half, and up to that time he never worked. Since the accident he had worked about 15 days on a vegetable truck, but his back hurt

and he became nervous. He wears all the time a brace composed of canvas and leather strips. He had no difficulty or pain or inconvenience or discomfort of any kind in his back or any other part of his body before the accident. Recently, Dr. Meinhardt has given his back electrical treatments.

Plaintiff's evidence tends to show by his witness, Dr. Meinhardt, that plaintiff first saw said doctor the early part of January, 1928. At that time he had a large amount of tenderness over the entire back extending from the lower part of the shoulders down to the hip, and the muscles of those regions were tender on pressure or palpation; the muscles were rigid and somewhat tender and boardlike. He was nervous. At that time he weighed 145 to 150 pounds and he complained of headaches, pain in both hips, inability to stoop or bend over, and his back became worse when he moved around. The treatment prescribed was rest and heat to the back. His muscles also were given massage. He was given liniment for his hips and sedatives to rest and sleep. His back was taped with adhesive which was kept on for one, two or three months. A supportive belt was suggested and plaintiff has worn two or three while under the doctor's care. In 1929, X-ray pictures were taken, but were not produced at the trial, as those pictures, during a former trial, were left at the courthouse. The doctor's diagnosis was a hyperthropic arthritis of the spine. He shows a projection of bone in the spinal vertebrae and a growing between that is abnormal. The doctor is waiting for this condition to become solid and there is not much that can be done for him medically. The doctor expects the bones to become fused or ankylosed. This condition exists between the 10th and 11th vertebrae, corresponding to the 10th and 11th ribs,

and located about the middle of the back. The spine ankylates backward in this region. He has a curvature of the spine to the left which is congenital. An arthritic condition two weeks after the injury would be too soon to say that that was due to the injury. The doctor found increased arthritic deposits between the 10th and 11th vertebrae. Plaintiff had an arthritic condition which antedates the injury, but that since the injury the X-rays show that the projection of bone has increased. In a general way, if the condition were permanent previous to the accident, we can assume that it became lighted up, and in the doctors' opinion this fall lighted up the condition and caused this bone. The condition is very painful. Plaintiff has a disability with respect to manual work, and after that he will have a disability because of the back being stiff.

On cross-examination, Dr. Meinhardt said that plaintiff at present weighs 150 pounds, that plaintiff can work, depending upon the kind of work, and that there are some types that he should be able to do. He does not think that plaintiff was as agile as he was previously. Even with a pain a man can do things. Plaintiff has had no broken bones that the doctor found. The X-ray pictures that the doctor took on January 17, 1928, showed a condition of some bony growth in the lumbar region. The ankylosis condition now is between the 10th and 11th thoracic vertebrae, two vertebrae above the part that the doctor X-rayed on January 17, 1928. The ankylosis condition is in the lower part of the back and the chest and the doctor did not take an X-ray of the bones of the thoracic vertebrae. Of his own knowledge the doctor does not know whether there is an ankylosis condition. He did not know whether the ankylosis condition was there previously. The spurs

may be a result of the condition existing. He X-rayed plaintiff three times, but he never X-rayed the place of this ankylosed condition. The original arthritis was due to a diseased condition and it must have existed before the injury. The X-rays did not show any broken bones. The bone growth of the upper lumbar region that plaintiff had could not occur in a week or two. From history of the patient, the doctor believed that the injury was lighting up the condition. The part of the back that the doctor X-rayed was due to hypertrophic arthritis and the accident of November 27, 1927, had nothing to do with it. Plaintiff complained to the doctor only of his back and hips and headaches. He did not complain of falling on his head or tell the doctor that he had hit on his head.

Plaintiff's testimony tends to show by his witness, Doctor Peden, an X-ray expert, that he made X-ray pictures of plaintiff's spine and back on February 19, 1929. The X-ray pictures showed a slight amount of hypertrophic changes with a slight new bone projection on the 11th thoracic vertebrae. Instead of the bone being rounded, as it normally should be, it comes to a point. On October 3, 1932, the doctor took another X-ray of plaintiff. On the 12th thoracic vertebrae there was a definite projection or increase in this bony projection, and in addition, between the 10th and 11th, there is almost a complete fusion between the vertebrae. The two points have practically grown together and are attempting to form a union between the bones. The upper 10th has a little projection that he was unable to see in the 1929 pictures. The process as shown on the lower right side of the 11th thoracic vertebrae is very definitely increased in the last year. The doctor did not take the X-ray pictures for treatment. On taking the first X-ray pictures he could not see anything

in the way of fractures or dislocations, or anything of that sort. The 11th thoracic was the one that really was the most involved. His lumbar spine was comparatively normal. Hypertrophic arthritis may be due to infection or injury or changes in the glandular system, such as the thyroid and pituitary and other glands of the body or metabolism, the building or the tearing down of the tissues, or disease. It takes hypertrophic arthritis 6 months at the earliest to show in an X-ray examination following a definite cause. The doctor did not know whether the conditions found in the X-ray photographs existed or not before November 20, 1927, nor do the X-rays tell him that.

Plaintiff's testimony tends to show through his witness, Dr. Pernoud, that he first examined him on February 29, 1929. He found his back from his neck to his hips more or less rigid, the spine movements carefully guarded and the range of motion of the spine inhibited and less than normal. A tenderness on pressure around the spine existed and was dense and drawn tighter than his normal condition, which the doctors call muscle cord. The medical picture was what is called arthritis of the spine. He did not have plaintiff under observation for the purpose of treating him. He examined him on October 3, 1932, and found the previous conditions existing. He also found a slight lateral curvature of the spine which was not due to any malformation of the spine as he saw it. On the first examination, he complained of pain in his left hip, which had subsided. He had no complaint about his hips, but was wearing a supporting belt, and it appeared that the muscles were more rigid upon his examination on October 6, 1933. Plaintiff could not go up and down ladders on cars or move with agility when stepping or bending because of the stiffening of his back. If he did this for any period at all the pain would become so excruciating

that he might even faint or fall because of the shock. In the future he will still continue to suffer pain. It was the doctor's opinion it is permanent and that the active process will continue. The doctor's opinion was that the violence of the spine activity was reinflamed, that is, that it re-enacted the arthritis of the spine. He could not do work of strong physical labor, lifting or that activity. He might work for considerable periods of time, but he could not do any job of labor that would entail 8 hours' work day by day. The doctor said that many cases of arthritis are the result of injury, but that the greater number of cases are the result of disease. He presumed that plaintiff's original arthritis was due to a diseased condition and that it could have happened from metabolism or infection. Trauma usually lights up an infection. But that plaintiff's condition of November 20, 1927, was aggravated by the injury. He had no opinion of the cause of the original arthritis. However, he had no way of knowing how long the condition that he found in February, 1929, as to the 10th, 11th and 12th thoracic vertebrae had been there. The doctor said in answering questions he took into consideration everything possible with the history included, including the history of brothers and sisters. He said that he would say that the activity of the arthritis started at one time.

Defendant's evidence tends to show by its witness, Dr. Will, that he first examined plaintiff on February 18, 1929. At that time he found no gross abnormalities about the back except that plaintiff was slightly stooped. The movements of his spine were present in all normal directions, there were no definite fixed points, there were no palpable bony abnormalities, no definite points of localized tenderness. The clinical tests were executed to their normal extent with no back pain and no evidence of lumbar

muscle spasms. The movements of the lower extremities were accomplished in the normal fashion, that is, outward, upward and backward and were accomplished to normal and were hyper-tests of the extremities. They failed to elicit any spasm in the back. The X-ray examination showed some hypertrophic changes to the upper margin of the 4th lumbar vertebrae, also some hypertrophic changes of the 4th dorsal high up in the back. These changes had been there for probably several years, but at least longer than 6, 8, 10 or 12 months. He found no bumps or soreness to account for a pain over the back of the head. The condition in his back would not account for it. He found nothing in his examination with respect to his hips or lower extremities by way of objective signs of injury, that is, there was no swelling or atrophy or limitation of motion or any physical findings that he could put his finger on, nothing we call objective findings. He found no muscle spasms. The doctor again examined him on September 26, 1933. On the first examination he weighed 125 pounds and on the second 153 pounds. He still showed the slightly stooped position. Putting him through the various clinical tests that he went through before, the doctor was unable to find any definite clinical evidence of a back injury, that is, there was no spasm or anything to point to any definite injury to the back. He found his hips normal, that is, he found nothing in the way of injury or disease or any evidence of any fracture or bone deformity. The X-rays showed a normal spine. They do, however, show some hypertrophic changes in the lower margin of the 11th dorsal or thoracic, more pronounced on the right side than on the left. The doctor found no reason for plaintiff wearing a truss. The 10th and 12th vertebrae were normal, but the 11th does show those hypertrophic spurs. He could see no evidence of ankylosis. He could find noth-

ing in his physical or X-ray examinations to account for any inability to work. He thought he could labor as a car inspector and climb up cars. Plaintiff's hypertrophic spurs were in his opinion due to the man's age and particular type of occupation. The doctor did not believe that the fall caused the hypertrophic spurs. If the spurs were not there on September 12, 1929, the fall did not cause them in his opinion.

ASSIGNMENT OF ERRORS

I.

The court erred, over defendant's objections and exceptions, in refusing to give and read to the jury, at the instance of defendant, instructions in the nature of demurrers to the evidence, offered by defendant both at the close of plaintiff's case and at the close of the whole and entire evidence and case.

II.

Plaintiff's instruction No. 1, is erroneous and the court erred in giving it.

III.

The court erred in admitting in evidence rule No. 2, to the effect that cars with defective safety appliances should not be offered in exchange.

IV.

The verdict was and is excessive.

POINTS AND AUTHORITIES

I.

Plaintiff failed to make a case for the jury because Wabash car No. 76085 was not, at the time of the accident, being hauled or permitted to be hauled or used on defendant's line of railroad within the purview of the United States Safety Appliance Acts.

45 U. S. C. A., sections 11 and 13;
Brady v. Wabash R. Co., 329 Mo. 1123, 49 S. W. (2d) 24, 83 A. L. R. 655;
Kurtz v. Detroit T. & I. R. Co., 238 Mich. 289, 213 N. W. 169;
Sherry v. B. & O. R. Co., 30 Fed. (2d) 487;
B. & O. R. Co. v. Hooven, 297 Fed. 919;
McCalmont v. Penn. R. Co., 283 Fed. 736;
N. Y. Etc. R. Co. v. Kelly, 70 Fed. (2d) 548, Certiorari denied, 293 U. S. 595, 55 S. Ct. 110, 79 L. ed. 689;
Kaminski v. C. M. & St. P. R. Co., 180 Minn. 619, 213 N. W. 189, certiorari denied, 282 U. S. 872, 51 S. Ct. 78, 75 L. ed. 770;
Brady v. Terminal Railroad, 102 S. W. (2d) 903 (Mo.).

II.

Plaintiff failed to make a submissible case for the reasons following:

(A)

Plaintiff, in inspecting Wabash car No. 76085, for defects, was not within the provisions of the Safety Appliance Act, or the rule or regulation.

Kansas City. M. & O. Ry. Co. v. Wood, 262 S. W. 520;

Rittenhouse v. Railroad, 299 Mo. 199, 252 S. W. 945;
Railroad v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290;
Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729;
Railroad v. McWhirter, 229 U. S. 265, 33 S. Ct. 858, 57 L. ed. 1179;
Noftz v. B. & O. R. Co., 13 Fed. (2d) 389;
L. & N. R. Co. v. Cook, 150 Ky. 689, 150 S. W. 802;
Brady v. Wabash R. Co., 49 S. W. (2d) 24, l. c. 30-31;
St. L.-S. W. Ry. Co. v. Johns (Tex. Civ. App.), 286 S. W. 281.

(B)

Where the accident which results in the injury merely creates an incidental condition or situation that results in the injury, the failure to comply with the Safety Appliance Act, or the rule or regulation, is not the approximate cause of the injury.

Davis v. Wolfe, 263 U. S. 239, 44 S. Ct. 64, 68 L. ed. 284;
Railroad v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290;
Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729;
Railroad v. McWhirter, 229 U. S. 365, 33 St. Ct. 858, 57 L. ed. 1179.

(C)

The federal and common law rule is that a railroad employee must look for his own safety, and that a defendant is not liable except that it actually discovered the danger.

Toledo, etc. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 72 L. ed. 513;

Martin v. Wabash, 30 S. W. (2d) 735;
Allen v. Terminal Railroad, 68 S. W. (2d) 709.

(D)

The doctrine of assumption of risk applied to licensees and invitees.

Stein v. Battenfield O. & G. Co., 327 Mo. 804, 39 S. W. (2d) 345.

(E)

Plaintiff pleaded the Federal Safety Appliance Act. Consequently it was involved, and is exclusive.

Minneapolis, etc., R. Co. v. Popplar, 237 U. S. 369, 35 S. Ct. 609, 59 L. ed. 1000;
Moore v. Railroad, 291 U. S. 205, 54 S. Ct. 402, 78 L. ed. 755;
Gilvary v. Cuyahoga V. R. Co., 292 U. S. 57, 54 S. Ct. 573, 78 L. ed. 1123.

(F)

The rule that cars having defective safety appliances should not be offered in exchange was not enacted for the benefit of car inspectors.

Thomson v. Downey, 78 Fed. (2d) 487;
C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 945, 70 L. ed. 914;
C. & O. Ry. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42, 74 L. ed. 207.

(G)

The kind or amount of evidence required to establish negligence is not subject to the control of the several states.

C. & O. R. Co. v. Stapleton, 279 U. S. 587, 49 S. Ct. 422, 73 L. ed. 861;

Chicago, etc. R. Co. v. Coogan, 271 U. S. 472, 46 S. Ct. 564, 70 L. ed. 1041.

III.

Instruction No. 1, given by the court on motion of plaintiff, is erroneous. It is predicated on facts not in evidence.

IV.

The court erred in permitting rule No. 2, that cars with defective safety appliances should not be offered in exchange, in evidence.

Thomson v. Downey, 78 Fed. (2d) 487.

V.

The verdict is excessive.

Flynn v. Kramer (Mich.), 261 N. W. 77.

BRIEF OF THE ARGUMENT.

I.

The opinion of the Missouri Supreme Court is forceful (Brady v. Terminal Railroad, 102 S. W. [2d] 903), and we offer it as a part of our argument.

We submit that plaintiff failed to make a case for the jury because Wabash Car No. 76085, at the time of the accident to plaintiff, **was not being hauled or permitted to be hauled or in use** on defendant's railroad within the purview or meaning of the Safety Appliance Acts, to-wit, 45 U. S. C. A., sections 11 and 13.

The said railroad car, from which plaintiff fell by reason of the grab iron pulling out, had been delivered by defendant to the Wabash Railroad Company on said Wabash Railroad's exchange track some four hours previously and tendered to said Wabash Railroad for acceptance or rejection. Plaintiff, at the time of the accident, was an inspector and hunting for defective safety appliances. The grab iron that pulled out was a safety appliance. It will be noted that car No. 76085 was never rejected or returned to defendant.

We submit that said car was not in use or being hauled or permitted to be hauled by defendant at the time of the accident to plaintiff. The car had been delivered to the Wabash on its exchange track and tendered to it for acceptance or rejection and the Wabash had accepted it not only for that purpose, or to that end, but it accepted said car unqualifiedly, for the car was not rejected or returned to defendant. It was the absolute and non-delegable duty of the Wabash to inspect said car and certainly ascertain that the safety appliances on same were in good order. It follows that it could not rely on the

delivering carrier not to deliver or tender it dangerously defective cars. The Wabash Railroad had the positive duty of inspection before accepting the train tendered it by defendant. (Kurtz v. Railroad, 238 Mich. 289, 213 N. W. 169).

We are unable to conceive a shade of distinction between a car withdrawn from service or use for repair and inspection. In both cases they are withdrawn from service and use. In both cases, the car inspector and the car repairer are dealing with and hunting for and working upon defective safety appliances. That is the purpose of their work. That is what they are employed to do. The car was not in use, for it had been withdrawn from use for inspection. The hauling and use to which defendant put the car had ceased. It was on an inspection track, the equivalent of a repair track, out of use. It was out of use for inspection purposes. It would not again be put in use until after the inspection. It was the absolute duty of the Wabash Railroad, upon tender, to inspect the car for defective Safety Appliances. A failure to do so or the use of it on its lines would subject it to criminal responsibility by the Government. Be that as it may, it had the positive duty of inspection before accepting the train tendered to it by defendant, as Kurtz v. Railroad, 238 Mich. 289, holds. So, to give opportunity for inspection, the car must necessarily be withdrawn from service and use; and if it is withdrawn from service and use for any purpose, it must perforce be withdrawn from service and use for any and all purposes. The car was wholly out of present use at the time of the accident.

The latest case on the subject that we have found is N. Y. C. & St. L. R. Co. v. Kelly, 70 Fed. (2d) 548, certiorari denied, 293 U. S. 595. At l. c. 550, it is said:

"After a defective car reaches a place of repair, the

Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the Act, nor does merely shifting of cars within the place of repair put the car 'in use' within the meaning of the statute."

At l. c. 551 it is said:

"Had the car in question been en route to a repair place, a different situation would have been presented, but after it reached the repair place, was out of service, the carrier was entirely within its rights in taking off the handhold or any other of the safety appliances necessary to effect repairs, without violating the Safety Appliance Act."

In McCalmont v. Penn. R. Co., 283 Fed. 736, l. c. 739, it is said:

"In the present case no handling was in progress or in immediate contemplation. The car was wholly out of present use. The original putting on of the chain and the further adjustment of the chain were in the nature of temporary repairs which would permit the car to be taken to the shop, and, so long as work of this character is not done as a part of the immediate operation of hauling to the shop, it does not seem important whether the expected interval before hauling is a few hours or a much longer time."

In Sherry v. B. & O. R. Co., 30 Fed. (2d) 487, l. c. 489, it is said:

"It has accordingly been held by this Court that the Act has no application to equipment withdrawn from service and undergoing minor repairs preparatory to early return to service.

"In this case the defective car was not being hauled or used by the defendant, except in that it was stored

temporarily upon one of the ladder tracks. It had been withdrawn from use for the very purpose of undergoing repair. No movement was immediately contemplated, and no action of setting the brakes was necessary, save as incident to inspection and repair."

In Kaminski v. Railroad, 180 Minn. 619, 231 Mo. 189, at l. c. 191, it is said:

"We reach the conclusion that where a bad order car has been withdrawn from service and taken to and replaced in a repair yard where it is being repaired, subsequent to movements of the car, made in the course of work and for the purpose of facilitating it, are not within the operation of the Safety Appliance Act."

In Brady v. Wabash R. Co., 329 Mo. 1123, 49 S. W. (2d) 24, it is held, in substance, that a railroad car is not in service or in use when being inspected by a car inspector hunting for defective safety appliances.

In Reetz v. C. & E. I. R. Co., 46 Fed. (2d) 50, it is held that a railway, in operating a train with defective couplers and drawbars was not liable under statute for freight conductor's death in falling through a railway bridge, as the defective couplers and drawbars were not the proximate cause of injury.

In Kurtz v. Railroad, 238 Mich. 289, 213 N. W. 169, it is said:

(l. c. 170.) "Usual and permitted practice in the yard was that the Pere Marquette, before accepting trains tendered to it, removed dangerously defective cars found therein, or required defendant to do so."

(l. c. 171.) "If an employee of the Pere Marquette had been killed in the circumstances above related, the inspection would not have been a good defense.

It could not rely absolutely on the employees of defendant not to deliver it dangerously defective cars. It had the positive duty of inspection before accepting the train tendered it by defendant.

"The record will sustain a finding that Mr. Gall's (plaintiff) death was proximately caused by the subsequently intervening negligence of the Pere Marquette. Defendant's negligence is remote."

(l. c. 172.) "In such cases the failure to inspect or the negligent manner of doing it is the proximate cause of the injury to the employee, and the negligence of the company turning over the unsafe car is the remote cause."

We deduce from the foregoing cases the following legal conclusions:

(1.) The car plaintiff was inspecting and from which he fell, due to the grab iron pulling out, **was not in service or in use at the time of the accident.** This, because no hauling was in progress or immediate contemplation, for the car was being inspected to determine its future use. The car was wholly out of present use. The car was in storage temporarily for inspection. It had been withdrawn from use for the very purpose of inspection. A car is not in service or use when being inspected by a car inspector searching for defective safety appliances.

(2.) The delivery and tender of the car by the defendant to the Wabash Railroad, or the defective grab iron, were not the proximate cause of the accident. Those were remote causes. It was the absolute duty of the Wabash to inspect the cars. As is said in Kurtz v. Railroad, supra, the failure to inspect is the proximate cause of the injury. The purpose of the inspection was to find defective safety appliances. Plaintiff could expect to find

them for he was looking for them. His act of inspection was the proximate cause.

(3.) Plaintiff's act of inspection was an intervening cause. It was intervening because that was his duty, as the alter ego of the Wabash, to find defective safety appliances. Charged, as he was with the duty of finding the defects, his act of inspection intervened to break any causal connection.

(4.) Plaintiff assumed the risk. It was his duty to look for and discover defective safety appliances. He was legally responsible for failing to discover them. He knew the conditions he would have to cope with. He knew that he would find defective appliances, for that was the purpose of his work. In the contemplation of the law, he knew that they were there. Therefore, the defective grab iron was an open and obvious fact to him.

II.

Plaintiff failed to make a submissible case.

(A) The salient facts, as shown by the record, are that plaintiff was a car inspector, in the employ of the Wabash Railroad, whose duties, as such inspector, consisted in hunting and finding defective safety appliances and equipment on railroad cars, and that he suffered injury while inspecting and hunting for defective appliances in a stationary train of cars and upon finding a defective safety appliance, to-wit: a grab iron upon Wabash Car No. 76085, which had been tendered said Wabash Railroad by defendant for acceptance or rejection. Said car was one of train of cars that a few hours before had been transported by defendant from Missouri to Illinois and

tendered the Wabash Railroad as aforesaid. The purpose of plaintiff's inspection was to determine whether the Safety Appliances on said car and train of cars were in proper condition. Said car and train of cars were placed on track No. 11, in said Wabash Railroad Yards. Both the Wabash Railroad and defendant knew that plaintiff would make the inspection of the said train of cars in that regard. Plaintiff inspected all cars tendered said Wabash Railroad by other railroads. Defendant received said Wabash car No. 76085, from the Wabash Railroad, at St. Louis, Missouri, on November 16, 1927, transferred it to an industry, where it was unloaded, and in the Wabash yards at Granite City, Illinois, tendered it to said Wabash Railroad for acceptance or rejection on November 20, 1927, at 6 p. m. Plaintiff was injured from 3½ to 4 hours later.

We aver that plaintiff was not within the class intended to be protected by the grab-iron act, although we think the case is governed solely by the Federal Safety Appliance Act and the federal law.

The facts show that plaintiff, at the time of the accident, was inspecting and hunting for defective safety appliances on Wabash car No. 76085, which was stationary and had been placed there for inspection by him. It was his duty to hunt for and find defective appliances. Some one must do that. As appliances on cars become defective, some one must be delegated to find them. That is the purpose of the inspection and the reason for the employment of the inspector, that is, to hunt and find defective appliances. As defects inevitably occur, both patent and latent, inspectors, as a matter of law and fact, know they are there. Figuratively speaking, in inspecting and hunting for defective safety appliances, an inspector puts his head in the lion's mouth. If a lion injures the one so doing, no lia-

bility on the owner's part. Thus, one dismantling a building may not recover for injuries in that regard, because the employee makes his own place of work. So, an employee, in inspecting, makes his own place of work and knows that sooner or later he will find a defective safety appliance, and one that may injure him. His very work is a source of danger and puts him at practically every step into peril. But that is the purpose of the inspection. Without defective appliances, no inspection, and without inspection, no job. Without the job, no peril, but of course the peril is an inherent and concomitant element in the job, and plaintiff may not escape it.

An inspector, injured while about his duties inspecting a car for defective safety appliances, does not come within the purview of the Federal Safety Appliance Acts. Consequently, one injured because of a defective grab iron on a car, does not come within its benefit. He is not within the class of persons intended to be covered by the Act. It was intended to provide against injury of those using the cars to operate the trains, such as brakemen, not against injury to one who was hunting for defects for repair prior to the operation of the car in commerce. Plaintiff was not using the grab iron to operate the train, but was inspecting and testing it. It was said, with respect to a defective coupler, in Railroad v. Comarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290, l. c. 1292, that:

> "The principal question in the case is whether, at the time he was injured, the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could

it be, under the evidence, that the collision was proximately attributable to a violation of these provisions, but only that had they been complied with, it would not have resulted in injury to the deceased."

In Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729, the doctrine announced in the Conarty Case, supra, was re-declared and re-affirmed.

In Rittenhouse v. Railroad, 299 Mo. 199, 252 S. W. 945, it was held that the plaintiff therein, going between cars to inspect and repair a coupler, was not within the purview of the Safety Appliance Act.

The case of Kansas City M. & O. Ry. Co. v. Wood, 262 S. W. 520, is a gray mile case on the subject. It was held, in substance, that a railroad's duty, under a Federal Safety Appliance Act, to equip cars with and maintain automatic couplings for protection of employees, does not apply to a car inspector whose duty it is to inspect and repair defective couplings. Consequently, it was held that the plaintiff therein did not come within the provisions of the Safety Appliance Act. In this connection, in that case (Railroad v. Wood, supra), the Court says:

(l. c. 521.) "The plaintiff alleged, as the chief grounds of negligence of the railway company, the failure of the outgoing inspector, Akin, to note and have repaired all defects in cars in the yards, which included the water car, before he o. k'd them to plaintiff; negligence of the train crew handling the water car in failing to discover, repair and advise him of its defects."

(l. c. 525.) "Thus, it appears that, under the common law, an inspector, whose duty it was to inspect and repair appliances, could not recover for injuries suffered in the course of such employment. Nor do

we think it was the purpose of Congress to create any such new liability as to such employe in the passage of the Safety Appliance Act. As to such employe the risks of the injury are ordinary and such as are necessarily involved in the very nature of the employment. To seek out and remedy defects which the law prescribes must not be allowed to exist is the very thing he is employed to do, and it would be paradoxical to say that the master must furnish him perfect equipment to inspect and repair."

In Noftz v. B. & O. R. Co., 13 Fed. (2d) 389, l. c. 390, it is said:

"If a railroad company is required to furnish repairmen cars that are not defective, upon which to perform the duties of their employment, then defective cars can never be repaired."

In L. & N. R. Co. v. Cook, 150 Ky. 689, 150 S. W. 802, the facts show that the plaintiff, an inspector of engines in a railroad roundhouse, was scalded by hot water from the blow-off pipe, while under an engine inspecting a fire box attachment. Plaintiff could not inspect the engine without going under the boiler, and he knew, when he went under the engine, that the boiler inspector had not inspected the engine. It was not uncommon for the blow-off pipes to leak and water would sometimes spout out, intermittently, as when plaintiff was injured. Held, that the engine and boiler with respect to the danger involved in going under it, constituted one machine, and plaintiff assumed the risk of being scalded by water from the blow-off pipe, it being his duty, as engine inspector, to investigate for danger from that source.

It may be urged that, inasmuch as plaintiff was an employee of the Wabash, the rule is not applicable. We

think that any such contention is aside the question. He was a car inspector, putting his head into the lion's mouth. He was also a railroad yard employee, and, as Congress had occupied the field of interstate commerce relative to grab irons, that occupation of the field was exclusive. Notwithstanding plaintiff did not come within that class, Congress has legislated with respect to grab irons, and the federal rule must be applied. Having taken charge of the field grab irons, the federal rules as to whether the grab iron is within the act must apply necessarily. As we have said the plaintiff was a yard employee, and he was an experienced man. It was his duty to look out for his own safety. The work was being done in the ordinary, usual and customary way. It was a matter of common knowledge, a thing every inspector knew, that cars tendered to the Wabash for acceptance or rejection would have on occasions defective safety appliances. There was no evidence in the record that defendant knew that the grab iron was defective. Plaintiff understood the situation as well as defendant. On this subject, in Toledo etc. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 72 L. ed. 513, l. c. 517, the Court says:

> "In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him."

The Supreme Court of Missouri, in Martin v. Wabash, 30 S. W. (2d) 735, l. c. 746, applied that rule, saying:

> "The courts seemingly adhere to and apply the principle of the common law that yard employees, regardless of the class and character of their work, and

regardless of their precise and particular duties, must themselves look out for their own safety, and that switching or engine crews are under no duty or obligation, while engaged in yard movements, to watch out for the safety of yard employees, or to warn them, unless actually seen to be in immediate peril and oblivious thereof." See Allen v. Terminal Railroad, 68 S. W. (2d) 709.

As we have said plaintiff was an inspector and he may not escape the fact that he was hunting for defective safety appliances and that he will be held to have expected them, and to have known that they were existent. He was subject to the federal and common-law rule that yard employees must look out for their own safety, regardless of the class or character of their work, and that engine or switching crews were under no duty or obligation to discover defects, or warn them, unless they actually knew of the defect. This is the common-law rule and plaintiff must abide by it. In Brady v. Wabash, 49 Fed. (2d) 24, l. c. 30-31, while not deciding it, the court was impressed that plaintiff's recovery, because he was an inspector, was barred.

It is true that defendant tendered the car to the Wabash and therefore to plaintiff for inspection. But that was plaintiff's business, that of inspection. His class of work put him out of the protection of the grab iron act, and he assumed the risk. It was his duty to inspect all cars, and he says defendant knew that. The train of cars was in the possession of defendant, for they had not as yet been delivered to the Wabash, and consequently plaintiff took the cars as he found them, and he knew that he would find, or, at least, he could expect to find, defective safety appliances. The doctrine of assumption of risk is not limited to Master and Servant. Others take premises as

they find them. Thus in Stein v. Batterfield O. & G. Co., 327 Mo. 804, 39 S. W. (2d) 345, it was held that the doctrine of assumption of incurred risk is not limited to master and servant cases; that licensees and invitees assume certain risk in going on the premises of another; that an independent contractor, installing electrical apparatus on defendant's premises, was held to assume the risk of conditions obviously dangerous and known to be so.

Plaintiff was an inspector, whose duty it was to hunt for and discover defective safety appliances. He could expect to discover defects in the appliances, and he knew at some time he would find them. In contemplation of law they were there and he was legally responsible for failing to discover them. He could not rely upon the fact that they were not there, as could a switchman. It was the duty of the Wabash and consequently his duty to discover them. If he did not discover them, he was at fault. Thus, in contemplation of the law, he knew they were there. Therefore, the defect in the grab iron was open and obvious to him, as he knew it was there. He was an expert inspector following his own devices and he knew or will be held to have known the conditions he would have to cope with.

In this regard, plaintiff introduced in evidence the rule reading:

> "Rule 2. Yard interchanging cars. Paragraph 3. Cars (whether loaded or empty) having defects in violation of the Safety Appliance Act should not be offered in exchange."

The foregoing rule was not enacted for the benefit of a car inspector. If the rule was ever effective in plaintiff's behalf it had been waived by customary inspection of trains of cars by the Wabash and plaintiff. But it was not

formulated for plaintiff's benefit. It was formulated for the benefit of switchmen and train operatives. Why? Because it was intended to protect only those who operated trains and respect to whom only the duty to inspect was cast. In Thomson v. Downey, 78 Fed. (2d) 487, with respect to a very similar situation and rule, that of keeping a lookout for signals and obstructions by a fireman, it was held that the rule was not promulgated for the protection of section foremen.

Again, in C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. ed. 914, and C. & O. Ry. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42, 74 L. ed. 207, we have cases of such rules held not to be promulgated for the benefit of certain employees. Consequently, if plaintiff's employment does not come within the purview of the rule, then certainly defendant may not be held liable, under the federal and common-law rule, unless it actually knew that the grab iron was defective. Plaintiff was an inspector charged with the duty of finding defects, that of putting his head in the lion's mouth or feeding a cobra. It was his duty to protect himself from being bitten by them. Thus he must look out for his own safety. He could not expect perfect safety appliances, under the evidence, for he knew otherwise. No matter what precautions he took or how careful he may have been, his place of work was hazardous and dangerous and of his own seeking and volition. He could not expect cars with perfect safety appliances to inspect. He was on defendant's property, feeding and handling a figurative cobra, knowing that sooner or later he would encounter danger, an open and obvious peril, which he could expect and which he legally knew.

The rule introduced in evidence does not show or tend to show that it may be made a predicate of defendant's

responsibility to plaintiff. It is no evidence of negligence. An interpretation of it would lead to no other conclusion than that cars should not be offered in exchange when defendant knew they were defective. The interpretation put on said rule by plaintiff is unreasonable and arbitrary. Plaintiff was permitted to predicate liability on it, whether or not defendant knew of the defective safety appliance, even though it could not have discovered it by the exercise of ordinary care. In this connection, it will be noted that plaintiff exercised all the care possible, in testing it, by shaking it with his hand before he put his weight on it, and yet he did not discover that the grab iron in any way was defective. If plaintiff did not discover the defect upon using extraordinary care, then should defendant be held to an absolute discovery of it under the rule? The actual discovery of it by defendant's inspector would have resulted in the same or more serious injury, possibly, to him. We are unable to conceive that the rule meant that it was negligence to tender to the Wabash a car with a defective safety appliance.

The inspection of the car by the Wabash, through plaintiff, constituted an intervening link in the chain of causation. The proximate cause of the injury to plaintiff was not the offering of the car in exchange, but it was the inspection for defective safety appliances by the Wabash, through plaintiff. The inspection broke the chain of causation. The inspection was a cause that intervened. If the Wabash had not caused the inspection to be made, plaintiff would not have been hurt. The Wabash had full and complete control of the car for inspection. While the Wabash was probably endued with the duty of inspecting, so far as brakemen were concerned, it was under no duty to defendant to inspect the train of cars, for it had possession of them for that purpose and could accept it without in-

spection. Their inspection was a matter of indifference to defendant. The inspection was made for their own benefit. Plaintiff's injury resulted from an intervening cause, that of an order by the Wabash to inspect the train. There was no evidence in the record that defendant knew that the grab iron was defective. That must be the limit of the effect of the rule. But, even if not, the record contains no evidence that the defect could have been discovered by the exercise of ordinary care, for plaintiff did not discover it by such care. Consequently the rule in no effect was evidence of negligence on defendant's part.

(B) Of course, if plaintiff did not come within the purview of either the grab-iron act or the rule introduced by plaintiff, then neither one was the proximate cause of the injury to plaintiff. The governing rule is clearly stated in Davis v. Wolf, 263 U. S. 239, 44 S. Ct. 64, 68 L. ed. 284, as follows:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not the proximate cause of the accident which results in the injury, but merely creates an incidental condition or situation in which the accident otherwise caused results in injury."

We have heretofore attempted to demonstrate, and we think successfully, that neither the grab-iron act nor the rule were promulgated for the benefit of a car inspector. If so, then neither the act nor the rule applied to one hunting and finding defective safety appliances, and such defective appliance could not have been the proximate cause of the accident. In Railroad v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. ed. 1290, and Lang v. Railroad,

255 U. S. 455, 41 S. Ct. 381, 65 L. ed. 729, it was held that injuries caused by defective couplers, but not in the act of coupling, even though the injuries would not otherwise have occurred, were not proximately caused by the defective couplers, as the coupling act was not intended to cover such conditions. The defective grab iron was not the proximate cause of plaintiff's injury, we think.

(C) In Stein v. Battenfield O. & G. Co., 327 Mo. 804, 39 S. W. (2d) 345, it was held that the doctrine of assumption of risk applies to licensees and invitees, especially where contractual. Now the relation between defendant and the Wabash Railroad was contractual, that of the interchange of cars; and, as plaintiff in that regard was the alter ego of the Wabash to inspect the car, a contractual relation existed between plaintiff and defendant. Moreover, as plaintiff was either a licensee or invitee on the car, an offer to go on the car, and a permission, a contractual relation existed in that connection between plaintiff and defendant.

Of course, plaintiff was not within the provisions of either the grab-iron act, or the rule. He was an inspector searching for defects, figuratively feeding a cobra. An apt illustration is this: "A" contemplates buying "B's" house, but prior to doing so desires to inspect its roof for defects, using a skilled carpenter in that regard, one "C". "C", in inspecting the roof for defects, is injured by a defect, unknown to "A", that he was searching for during his inspection. May "A" be held liable for an injury to "C"? We think not, for the purpose was to find the defect, the very thing he was searching for. He was feeding the cobra.

Plaintiff was upon defendant's premises, searching for defects, to determine whether to accept or reject the car.

He knew as a matter of fact and law that he would find a defective appliance. That was the purpose of the inspection. As an inspector, he took the premises as he found them, and his employment was immaterial. That he was working for the Wabash can make no difference. His status was that of an inspector and he assumed the risk of finding defective safety appliances and of injury.

Here is the situation: Defendant tendered a car to the Wabash, unknown to the defendant to be defective and unknown by the Wabash to be defective when it first delivered said car to defendant four days prior to the injury. It was a Wabash car. Now defendant said to the Wabash, impliedly at least, we tender you that car. The Wabash replied, we desire to inspect it for defects, as did "A" when he contemplated buying "B's" house. The Wabash then sent its inspector, in the role of "C", to search for defects. This the Wabash could do or not as it desired. In other words, the defendant impliedly gave the Wabash permission to inspect the car at its own risk. Was not defendant in the same situation as "B" in permitting "A", by his alter ego inspector, to inspect his roof? It may be said that the inspection of the roof was for "A's" benefit, but was not the inspection of the car for the Wabash's benefit? The Wabash desired the train of cars for the revenue and to recover its property. "A" desired to have the house inspected for his benefit. The meat of the nut is that plaintiff was an inspector, inspecting premises, as a licensee or invitee, not known to be defective, searching for defects on premises that he knew he was liable to find and from which he might suffer injury. He was not in the situation of a brakeman or other employee who could rely upon his place of work as safe. As a matter of fact and law he knew it was not safe. He was without the provisions of the safety appliance act and

the rule. We think it must be held that he assumed the risk.

Under any phase of the evidence, as we view it, logical reasoning compels a finding that plaintiff has failed to make a submissible case. The cause should be reversed outright, we think.

III.

Plaintiff's instruction No. 1 constitutes error. It is predicated on the facts that defendant suffered and permitted the grab iron to be and remain in an insecure condition, when defendant knew, or by the exercise of ordinary care on its part would have known of its insecure condition, and that defendant failed to inspect or discover the grab iron in its insecure condition, when defendant, by the exercise of ordinary care on its part, could and would have discovered its insecure condition.

The record contains no evidence that defendant knew that the grab iron was insecure. That defendant knew that the grab iron was insecure was a necessary element of plaintiff's case under a theory of recovery most favorable to him. In fact, as neither the act nor rule was intended to protect a car inspector, plaintiff's only reasonable and logical theory of recovery, under any circumstances, was that defendant actually knew that the grab iron was insecure. As the record was without evidence in that regard, the instruction was erroneous for that reason. The federal and common law must be applied to the effect that yard employees must look out for their own safety.

Plaintiff, in the alternative also predicated his right of recovery on the fact that defendant could by the exercise of ordinary care, have known of the insecure condition of

the grab iron. As we have shown, plaintiff took the premises as he found them. He was a car inspector, with the duty cast on him to ascertain and discover defects. Unless defendant knew that the grab iron was defective, it was under no duty to inspect and discover, so far as plaintiff was concerned, that the grab iron was insecure. Plaintiff, as car inspector, was without the purview of the grab iron act. Neither it nor the rule were promulgated for his benefit. The Wabash could or not inspect it, as it saw fit. Plaintiff was in the position of an inspector for a prospective buyer of a house, who was injured while inspecting its roof and was hurt by a defect, unknown to the owner. Plaintiff took the premises, for the purpose of inspection for defects as there were. His employment warned him that his work was unsafe, thus rendering the dangers of the work open and obvious. He was not within the class of persons to whom the act or the rule applied. It is obvious, we think, that the instruction in this regard constituted error.

The predicate, in said instruction, that defendant failed to inspect or discover the insecure condition of the grab iron, when by the exercise of ordinary care it could have discovered it, is an involved statement. If plaintiff means that there was an absolute duty to inspect and discover same with regard to a car inspector, which seems to be meant, then the instruction constitutes error, for car inspectors were not within the class of persons covered by the act or the rule. The record contains no evidence that defendant failed to inspect the train, and the burden was on plaintiff to so show, if that was an element of his cause of action. If plaintiff meant, by the instruction, that the defect could have been discovered or known by the exercise of ordinary care, then what we have heretofore said,

with respect to the fact that defendant, by the exercise of ordinary care, could have known of the insecure condition of the grab iron, applies. Viewed from any angle that we may, the instruction constituted prejudicial error, we think.

IV.

The Court erred in permitting plaintiff to introduce in evidence rule No. 2, to wit:

> "Cars (whether loaded or empty) having defects in violation of the Safety Appliance Act should not be offered in interchange."

Common law negligence was predicated on the foregoing rule, which constituted error, for as Congress by legislation has taken charge of grab irons on railway cars, its enactments are paramount and exclusive. And as Congress has taken charge of grab irons on railway cars, the construction of the grab iron act, that is, determining those who come within its provisions, will be decided by the United States Supreme Court. Certainly, the grab iron act is applicable to the situation before us. All enactments and rules with respect to the subject are in conflict with it and are null and void. Defendant, if liable to plaintiff at all, is not liable because it has been guilty of common law negligence of any description, but because there has been a violation of a safety appliance act.

But, in any event, the rule was not promulgated for the benefit of car inspectors, but for the benefit of men who operate trains and who could expect safe working conditions. Plaintiff was not of that ilk, for he was charged with the duty of finding defects and will be held both in fact and in law to have known of the defective condition of the car. We need not elaborate on what we have here-

tofore said regarding the rule, to which we refer. Suffice to say that, if plaintiff's employment did not place him within the purview of the safety appliance act, then certainly his employment did not place him within the purview of the rule. We think the case of Thomson v. Downey, 78 Fed. (2d) 487, rules our contention. The admission of the rule in evidence and the predication of defendant's liability thereon, we think, constituted error.

V.

We submit that the damages awarded plaintiff by the jury were grossly excessive. The record shows no broken bones, no injury except that he fell on his back and his left hip was cut, bruised and rubbed by the cinders. He was at the hospital for six days, then went home where he remained for three or four days and then went to the office where he remained until he acquired "suitis" and filed suit in January, 1928, against the Wabash Railroad. He said he did no work while at the Wabash office, but nevertheless he was paid.

Plaintiff's chief complaint, as to injuries, and almost his sole complaint, for any other injuries he sustained are inconsequential according to the evidence, relates to the fusion or ankylosis of the 10th and 11th vertebrae. This is the injury that he complains of as important, and his petition and testimony are based on the fact, not that the fall caused the arthritis, fusion and ankylosis of the 10th and 11th vertebrae, but that this condition pre-existed the fall, and that the fall reinflamed and re-enacted the condition. Plaintiff's petition in that regard avers:

> "And that on account of said injury, a dormant, pre-existing arthritis thereof was caused to become active and painful; that the arthritis did progress and become aggravated and disabling."

The evidence fails to show any arthritic condition on plaintiff's back relative to the 10th, 11th or 12th thoracic (or dorsal) vertebrae at the time of plaintiff's injury. The evidence does not show any arthritic condition subsequent to plaintiff's injury to the 10th, 11th or 12th thoracic vertebrae, until he was X-rayed by Dr. Peden on February 19, 1929, fifteen months after the injury. It does not show that these thoracic vertebrae were in any way involved prior to that time, and consequently the record is without proof that a dormant pre-existing condition of the 10th, 11th and 12th thoracic vertebrae was lightened up, re-inflamed or re-enacted. Dr. Peden did not know whether the conditions found in the X-ray photographs existed or not before November 20, 1927, nor do the X-rays tell him that, so he said. Dr. Meinhardt did not at any time X-ray plaintiff's thoracic spine, that is, the 10th, 11th and 12th thoracic vertebrae. He only X-rayed the lumbar vertebrae, an entirely different part of the spine, and there he found an arthritic condition antedating the injury to plaintiff and not caused by the injury. There is no evidence in the record that the arthritis of the lumbar spine caused plaintiff's condition complained of at the time of the trial. The condition that plaintiff complains of is the fusion or ankylosis condition of the 10th and 11th thoracic vertebrae and the spurs on the 12th thoracic. Dr. Peden said that the lumbar spine, that which Dr. Meinhardt X-rayed in January, 1928, was comparatively normal, and that said arthritis of the lumbar spine was due to a diseased condition and must have existed before the injury. Dr. Pernoud said that he had no way of knowing how long the condition that he found in February, 1929, as to the 10th, 11th and 12th thoracic vertebrae had been there.

Plaintiff's whole case, as to any permanent injury and as to disability, is predicated on the fusion or ankylosis of

his 10th and 11th thoracic vertebrae and as to the spurs on his 12th thoracic. He pleads that a dormant, pre-existing arthritis became activated, aggravated, progressive and disabling. His evidence tends to show only a disabling condition of the 11th and 10th thoracic vertebrae. It does not show a disabling or a painful condition as to any other part of his body that was permanent. Dr. Pernoud said that the pain in his hip had subsided. Even if the evidence tends to show that the headaches were due to the injury, which it does not, the record is without probative proof that such headaches continued.

The record contains no evidence that plaintiff had an arthritic condition on his 10th, 11th and 12th thoracic vertebrae before the accident. Dr. Meinhardt did not X-ray those vertebrae and, of course, he did not know and could not know that an arthritic condition with respect thereto existed before the accident. Dr. Peden X-rayed plaintiff first on February 19, 1929, fifteen months after the accident, and all he noticed at that time was a slight amount of hypertrophic changes with a slight new bone projection on the 11th thoracic vertebrae. The 11th thoracic was the one that was really the most involved. Dr. Peden further testified that he did not know whether the conditions found in the X-ray photographs, with respect to the 10th, 11th or 12th thoracic vertebrae, existed or not before November 20, 1927, nor do the X-rays tell him that. He said he could not tell the cause of this condition (Abst. 88). Dr. Pernoud testified that he had no way of knowing how long the condition that he found in February, 1929, as to the 10th, 11th and 12th thoracic vertebrae had been there and he could not tell.

Plaintiff does not charge or claim, either in his pleadings or his proof, that plaintiff's fall on November 20, 1927, caused the condition of the 10th, 11th and 12th thoracic

vertebrae as found on February 19, 1929, and thereafter. He does not claim in his petition that the fall caused the arthritic condition of his 10th, 11th and 12th thoracic vertebrae to form, and his only claim is that there was a pre-existing arthritis which was caused to become active, progressive and aggravated and disabling. Nor could he so claim, for there is not a scintilla of evidence in the record in the opinion of any doctor that the fall caused the arthritis later found with respect to his 10th, 11th and 12th thoracic vertebrae. He predicates his case wholly on a pre-existing arthritis as to those vertebrae, which he pleads and claims was reinflamed and re-enacted and lighted up. In that the record contains not a scintilla of evidence that the condition later found of plaintiff's 10th, 11th and 12th thoracic vertebrae pre-existed the accident, or that the accident caused the condition, plaintiff's case in that regard falls to the ground. This was the only condition that it was claimed tended to disable him.

Now the only other evidence as to injuries resulting from the accident that plaintiff claims that he suffered was the reinflaming of his lumbar vertebrae, the pain in his hip, resulting from the bruise of the fall, and headaches.

As to his lumbar vertebrae, the first time Dr. Meinhardt X-rayed was in the early fall of 1928, and in January, 1929. He said the condition of his lumbar spine was due or might have been due to a diseased condition, and some arthritis must have existed before injury (Abst. 55 and 56). The history of the case led him to believe that the injury was lighting up the condition, but he did not say that it was doing so (Abst. 60). Dr. Peden (Abst. 86-87) in this regard testified that his lumbar spine, he thought, he has always thought all the way through, was compara-

tively normal. There was no testimony that the condition of his lumbar spine was in any degree disabling.

While there is evidence that plaintiff had some pain in his hip caused by a bruise, the evidence runs that the pain subsided. Anyway the record contains no evidence of more than a bruise and an abrasion to the hip, nothing of a permanent nature or inconvenience.

While plaintiff testified that he had headaches, there is not a scintilla of evidence in the record that the headaches were in any measure caused by the accident.

We cite Flynn v. Kramer (Mich.), 261 N. W. 77, to show the attitude of a state of large population respecting the subject. In that case, plaintiff, a 51-year-old hoisting engineer, sued to recover for injuries received in an automobile accident. He was employed by the City of Chicago at a salary of $55 a week. He was off two and a half months and was then employed at an easier job at the same pay. His right eye was knocked out, his kneecap smashed, and his frontal bone crushed. The jury returned a verdict of $25,000, and, on appeal, the verdict was affirmed for $10,000, upon a remittitur of $15,000, ordered by the Supreme Court of Michigan.

With respect to the injuries, in our opinion, this case, according to the evidence, has all the earmarks of being abnormally and irregularly magnified.

THOMAS M. PIERCE,
JOSEPH L. HOWELL,
WALTER N. DAVIS,
Counsel for Respondent.